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JAMES R. BR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 646

THE WANDERER

FIREMAN'S FUND INSURANCE COMPANY,
Petitioner-Appellant Below,

versus

WILBURN BOAT COMPANY, ET AL.,
Respondents-Appellees Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Respondents-Appellees Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of United States:

Petitioner, Fireman's Fund Insurance Company, respectfully shows:

Summary Statement of the Matter Involved.

The Court of Appeals notes that the parties have stipulated that the case "shall" be tried "solely" on the evidence admitted and judicial admissions made at the trial held shortly after the occurrence of ten years ago — when the evidence was fresh to support all defenses, including sub-

stantiation of the indications found in respondents' own proof that this insurance claim was based on a foul loss.[1]

At that time respondents presented no evidence sufficient to support any judgment in their favor on any theory; the Court of Appeals so holds.

Having no occasion whatever to present evidence to defeat a case that was not made, petitioner let the record close with respondents' insufficient proof. (R. 286) The Court of Appeals correctly observes that petitioner doubtless adopted its course at the trial because of the insufficiency of respondents' proof.

Upon the evidence admitted; and judicial admissions made at that trial (on which the respondents *stipulated* that this case "shall" be "solely" tried) the Court of Appeals holds that it is clear, if not conceded, that respondents cannot recover under the law of Illinois (where this insurance was sought, negotiated, completed and issued.

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[1] These include: When she was burned on February 25, 1949 (R. 110; references are to the record as certified) the vessel had been insured for $40,000.00, substantially more than the total investment therein. (R. 49) Respondents' witness familiar with vessel sales on Lake Texoma (who undertook to put a market value on her) conceded that there was actually no market for her. (R. 220) She had been pledged by respondents by successive chattel mortgages for a total of $28,000.00, all of it still unpaid (R. 112), and one of the two $10,000.00 prior lien mortgages to a bank (if not both) was recently (on January 4, 1949) past due. (R. 126)

Altered to engage in the passenger excursion business (R. 40) and used by the Wilburns and the Oklahoma corporation to which they sold her (R. 47, 113) in that traffic so far as patronage was available (R. 110) she had made only three or four trips with passengers for hire. (R. 165) She was out of use (R. 111); taken from a boat yard and afloat at mooring 300 feet off shore in Oklahoma (R. 45)—not her dock (R. 106, 111, 120)—she was then burned and sunk in the small hours of the morning of February 25, 1949. (R. 167)

See *Fidelity Mutual Life Assn.* v. *Harris*, 94 Texas 25, 57 S.W. 635, 639 (1900).) Upon that record the Court of Appeals now holds that respondents might or might not be entitled to recover under the statutory law of Texas (see *Citizens State Bank* v. *American Fire & Casualty Co.*, 198 F.2d 57 (CA-5, 1952)) but does not pass on that, the record before it being insufficient to bring the transaction within the reach of the statutory law of Texas.

Noting the stipulation of the parties that the case shall be tried solely on the evidence admitted and judicial admissions made at the first trial; and considering all other circumstances, the Court of Appeals holds that the case was in such a posture that the District Court could not "take judicial notice" that the petitioner was "doing business" within the State of Texas (which the District Court had purported to do on the basis of a copy of a "certificate of authority" to do business that had been filed with the clerk after the second trial below).

But then, although the Court of Appeals notes the stipulation of the respondents that the case shall be tried, solely, on the evidence admitted and judicial admissions made at the first trial — although respondents made no complaint whatever of the stipulation in either court — although no findings are made against the validity of the stipulation — the Court of Appeals abruptly (but not inadvertently, in view of the petition for rehearing) and without addressing itself expressly to its abrogation of the unchallenged stipulation of the parties, holds that, contrary to the unchallenged stipulation, the case shall *not* be tried solely on that evidence and those admissions, but that there shall be a new trial with new evidence, although evidence by which petitioner could have supported defenses under Texas law *is now ten years old.*

It is accordingly believed that a decisive aspect of the case that should be dispositive of this protracted litigation is now ripe for review: When the respondents with ample time for the most mature consideration and well knowing of this "certificate of authority" (they went outside the record to make a "copy" thereof an "exhibit" to their earlier brief in this Court) in order to secure to themselves advantages they sought and have fully enjoyed thereby, deliberately secured a *stipulation* that the case *shall* be tried *solely* on the evidence admitted and judicial admissions made at the first trial, and the petitioner has foreborne to put in any evidence *when the evidence was fresh and available* (first because respondents failed to make a sufficient record, and then because of that stipulation) — then may the Court of Appeals *sua sponte* abrogate the valid and unchallenged stipulation without even addressing itself to its validity and direct, contrary thereto, that the case shall *not* be tried solely on that evidence and those admissions, and thereby require the petitioner to support defenses (under a different law, clearly held inapplicable upon the record and under the stipulation) with any mere fragments of the evidence as may remain *after ten years*?

The stipulation reads:

"STIPULATION.

"It is stipulated that this case shall be tried solely on the evidence admitted and judicial admissions of fact heretofore made in this cause in this Court, on which judgment was entered on December 13, 1951.

STRASBURGER, PRICE, KELTON, MILLER & MARTIN,
GULLETT & GULLETT,
T. G. SCHIRMEYER,
By (s) ALEXANDER GULLETT,
Attorneys for Plaintiff.
LORD, BISSELL & BROOK,
KEITH & KENNEDY,
By (s) JOE A. KEITH;
Attorneys for Defendant."

The Basis of the Court's Jurisdiction.

The Court of Appeals for the Fifth Circuit entered the judgment of which review is sought on September 18, 1959, and on October 17, 1958, denied the petition for rehearing filed therein by the petitioner. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented.

1. After remand to the District Court, following this Court's earlier decision (*Wilburn Boat Company* v. *Fireman's Fund Insurance Company*, 348 U.S. 310) the cause was submitted under an express stipulation of the parties that the cause shall be tried solely on the evidence admitted and judicial admissions of fact theretofore made on the initial trial resulting in the judgment subsequently reversed by this Court. The transcript from the initial trial contained nothing, as the Court of Appeals expressly recognizes, upon which the District Court could base a finding that the respondent was doing business in the State of Texas. The Court of Appeals recognizes that without such an adequately supported finding the respondent was entitled to judgment. The occurrences in question are now ten years old as to all petitioner's defenses. On these facts the question is: may a Court of Appeals at this late date on its own motion, without request by either party, and without any consideration or request for consideration by the trial court, set aside the valid and unchallenged stipulation of the parties *sub silentio*, by remanding the case to the District Court for a new trial to consider any and all additional evidence the parties desire to present — contrary to their stipulation — and whether or not in conflict with their express stipulation?

2. May a Court of Appeals on these facts set aside such stipulation on its own motion without any request there-

for and without any finding (or evidence to support such a finding) in the trial court that (1) the respondents would suffer substantial injustice and (2) that the petitioner can be restored to the same position it would have been in if no stipulation had been made?

Reasons for Granting the Writ.

1. The decision directly conflicts with the decision of the Court of Appeals for the Second Circuit in *Greenspahn* v. *Joseph E. Seagram & Sons*, 186 F.2d 616 (CA 2, 1951), and the decision of the Court of Appeals for the Ninth Circuit in *Berry* v. *Commissioner*, 254 F.2d 471 (CA 9, 1957). See also *Burstein* v. *U.S.*, 232 F.2d 19 (C.A. 8).

At the second trial (before a different judge) the District Court below did not purport to set aside the stipulation of the parties that the case shall be tried solely on the evidence admitted and judicial admissions made at the initial trial. Instead, the District Court purported to take judicial notice that the petitioner was doing business in Texas in June, 1949 (and that Texas law therefore applied in determining petitioner's liability on the policy) on the basis of a purported certificate of the Board of Insurance Commissioners of Texas that petitioner was qualified to write insurance in the State of Texas at that time, which certificate was never in court nor admitted in evidence during either trial, but was filed by respondents with the Clerk of the District Court long after the second trial was concluded and nearly two months after the final judgment was entered. The Court of Appeals below expressly noted that the stipulated record contains no evidence on which the Court could base a finding that petitioner was doing business in Texas. The Court of Appeals quite properly held that neither was the certificate of au-

thority filed with the Clerk evidence nor could the District Court by "judicial notice" conclude that the petitioner was actually doing business in the State of Texas.

The Court of Appeals expressly stated that *on the record before the District Court* petitioner was entitled to judgment in its favor. And the parties had expressly stipulated that *this record* and this record *only* should be considered upon the retrial. Yet the Court of Appeals reversed and remanded for a new trial at which the petitioner and respondents are to be permitted to change that record by other or further evidence on this and all other phases of the case, as to occurrences now ten years old. The Court of Appeals without being requested to do so by either party and without any showing before the trial court or the Court of Appeals against the stipulation, completely disregarded and treated as a nullity the stipulation of the parties that the case shall be tried solely on the evidence admitted and admissions made at the first trial.

In the *Greenspahn* case, *supra,* the plaintiff sued for specific performance of contracts to sell "Kentucky" whiskey. This was construed to mean whiskey manufactured by the defendant, and specific performance was granted. The defendant appealed. While this appeal was pending the plaintiff and defendant, together with several of the plaintiff's relatives (who had obtained a judgment against the defendant in a separate suit) joined in a stipulation to settle both suits, whereby the defendant agreed to perform the decree. Thereafter the defendant determined that the stipulation worked a hardship on it inasmuch as it did not have sufficient whiskey of its own distillation on hand to enable it to perform the *Greenspahn* decree, and asked (as these respondents here did not) to be relieved of their stipulation. The District Court re-

fused and the Court of Appeals affirmed, stating at page 620:

> "To obtain relief from a stipulation the moving party must show that unless relieved he will suffer a substantial injustice and that the other parties to the stipulation can be restored to the same position they would have had if no agreement had been made."

The respondents have enjoyed to the full the benefits of the stipulation in that petitioner was thereby precluded from offering at the second trial the evidence then available in support of defenses (such as that the loss of the vessel was the result of arson) which would have clearly been valid even under Texas law. There was then available to respondents any evidence now available as to whether or not the petitioner was doing business in Texas at the time the policy was issued (no claim is made, or could be made, otherwise). They preferred to forego whatever advantage they might have gained by such evidence in order to be assured that the petitioner would forego presenting its then available evidence in support of defenses. Years thereafter, the Court of Appeals, of its own motion, without even being asked to do so, relieves the respondents of their deliberate stipulation. The evidence the petitioner had at that time as to defenses is now weaker by the passage of that extended period of time. In ten years, and in two trials, respondents never made a case that required petitioner to make defenses good under Texas law. Petitioner cannot possibly be restored to the same position it would have been in had no stipulation been made. "Justice" is a two-way street; the Court of Appeals had before it no showing that substantial injustice would result if the stipulation were enforced nor that the petitioner could "be restored to the same position" it would have been in had the stipulation not been made. Nor did it have before it any evidence that the respondents would suffer "substantial in-

justice" if judgment were entered in favor of petitioner. Such action by the Court of Appeals is in direct conflict with the decision of the Court of Appeals for the Second Circuit in the *Greenspahn* case which held that it would have been error for the District Court to have set aside a stipulation without such a showing.

The decision below is also in direct conflict with the ruling of the Ninth Circuit Court of Appeals in *Berry* v. *Commissioner, supra.* In this case the issue was whether a corporate income tax return was timely filed. If the corporation was in existence during the whole of the calendar year, the return was filed within the statutory period. The parties stipulated that the corporation disposed of its assets on October 31, 1949, and ceased to do business on that date. At the trial counsel for petitioners asked to be permitted to offer testimony explaining the stipulation and to show that the corporation did not actually wind up its affairs as of October 31. The trial court admitted evidence to establish this fact. On appeal, the Court of Appeals noted that on remand the Tax Court should make clear as to how far it considered the stipulation binding, stating at page 474:

> "It is our opinion, on the one hand, that it was the responsibility of counsel for petitioner to obtain a clear ruling of the trial court setting aside or modifying the stipulation. Ordinarily, a stipulation by counsel, especially if in writing, establishes the facts absolutely. *Of a certainty it cannot be disregarded in an appellate court.* • • • There are expressions in the record which indicate that the presiding judge intended thereby to permit modification or contradiction of the written stipulation. *However, this should have been done by express modification of the instrument, if that were the intention, rather than by indirection.*" (Our emphasis)

The Court of Appeals below in this case did precisely what the Court of Appeals for the Ninth Circuit stated was improper, and worse. It set aside the stipulation on appeal. It set it aside on its own motion without any request whatever, let alone formal motion, by respondents' counsel that it be set aside. It set aside the stipulation by indirection without any express modification of the instrument. This Court should grant a writ of certiorari to review the judgment below to resolve these conflicts.

2. The effect of agreements by parties on what shall be the factual basis of decision is of importance in litigation in the federal courts. It is the policy of the law to encourage such stipulations (see, for example, Rule 31 (b) (1) of the Rules of Practice of the Tax Court of the United States) in order to make feasible the disposition of the ever-increasing flow of litigation involving a large mass of factual data. It is vital, if this policy is to succeed, that parties be assured that they will not be penalized by having an appellate court set aside such an agreement without an adequate showing of good cause, sufficient to set aside a contract generally — penalized by allowing the other party to introduce other and further evidence after having had the benefit of the stipulation for a period of time sufficient to destroy the effectiveness of the opposing party's oral testimony on matters not included in the agreed factual basis of decision.

True, the decision below runs against the great weight of authority in this field, but it does represent the considered opinion of the Court of Appeals for one of our larger circuits. This Court should review the judgment below in order to lay down definite rules for the guidance of the federal courts as to:

(1) Whether a federal court of appeals *sua sponte* may abrogate a valid stipulation of the parties — of which neither party complains — that a case shall be tried solely on the evidence admitted and judicial admissions theretofore made of record?

(2) What showing is necessary to justify relieving a party from a stipulation that the case be tried *solely* on certain evidence and admissions?

(3) Is the Court of Appeals or the trial court the proper tribunal initially to determine whether a stipulation of the parties will be abrogated?

(4) Should a tribunal making the determination to relieve a party of a stipulation be required to rule specifically on the question or may it merely disregard the agreement?

(5) Are the parties involved entitled to be heard in opposition before the stipulation is vacated?

Petitioner submits that the Court of Appeals below has answered all of these inquiries in a manner in conflict with the generally accepted rules applied by the courts (both federal and state) in this area of federal procedural law.

The general rule is that in the absence of grounds sufficient to authorize a court to set aside a stipulation, an agreed statement of facts on which the parties submit the case for trial is binding and conclusive on them, and they will not be heard to claim that there are other facts that the Court may presume to exist. So also the Court is conclusively bound by the facts stated and must render judgment as the agreed facts, and they alone, require. *Williams* v. *Hirschfield*, 32 Okla. 598; 122 Pac. 539 (1912); *Gillett* v. *Detroit Board of Trade*, 46 Mich. 309; 9 N.W. 428

(1881); *Burstein* v. *U. S.*, 232 F.2d 19, 22 (C.A. 8, 1956). Where, as here, the stipulation purports to include the whole factual predicate upon which the case shall be tried, matters not included in the stipulation are inadmissible, *Aetna Life Ins. Co.* v. *Smith*, 293 S.W. 243, (Tex. Civ. App. 1927); 83 C.J.S. *Stipulations*, Sec. 25(b).

Similarly, it is almost universally held that a stipulation that a case shall be tried on certain facts is a contract and cannot be set aside or modified except upon a showing of facts sufficient to justify setting aside or modifying contracts generally. Such grounds include mutual mistake of fact (as where the parties agree to the truth of a given statement which actually is false), or fraud in procuring the execution of the document. *Bingham* v. *Supervisors Winona County*, 6 Minn. 136 (1861); *Lee* v. *Wimans*, 99 App. Div. 297; 90 N.Y.S. 960 (1904); *Bond* v. *Bond*, 260 App. Div. 781; 24 N.Y.S. 2d 169 (1940); *People* v. *Houser*, 85 Cal. App. 2d 686; 193 P. 2d 937 (1948); *Gonzales* v. *Pacific Greyhound Lines*, 34 Cal. 2d 749; 214 P. 2d 809 (1950); *Lee* v. *Wharton*, 11 Texas 61 (1853); *Villareal* v. *Passmore*, 145 S.W. 1086, 1087 (Tex. Civ. App. 1912).

The court will not presume such facts but requires a showing of good cause. The doctrine of the authorities is that courts will not act to set aside a stipulation of facts except upon proper application by a party. The court will not relieve a party of a stipulation merely because inadvisedly entered into even though it may operate harshly unless all the parties may be placed in the condition in which they were before the stipulation was made. *Cole* v. *State Compensation Com'r.*, 114 W. Va. 633; 173 S.E. 263 (1934); *Emerick & Duncan Co.* v. *Hasey*, 146 Fed. 688 (CA 9, 1906).

Finally, the rule generally followed is that issues involved in setting aside a stipulation are to be made, by timely request to the trial court, so that they may be determined there. *Weinroth* v. *603 Fifth Ave. Corp.*, 102 N.Y.S. 2d 471 (Sup. Ct. 1951). A reviewing court has no power so to do on its own motion, the parties being required to move in the trial court to have it corrected. *Texas Employers Ins. Assn.* v. *Wright*, 297 S.W. 764 (Tex. Civ. App. 1927), modified on other grounds 4 S.W. 2nd 31 (Tex. Comm. App. 1928).

CONCLUSION.

The action of the Court of Appeals below runs counter to all of these well established principles. The Court should hear this case to resolve the conflict and establish definite rules for the guidance of the lower federal courts in this important area of federal procedural law.

Respectfully submitted,

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Attorneys for the Petitioner-Appellant.

APPENDIX.

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 16945

FIREMAN'S FUND INSURANCE COMPANY,
Appellant.

versus

WILBURN BOAT COMPANY, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Texas.

(September 18, 1958.)

Before HUTCHESON, *Chief Judge*, and TUTTLE and BROWN, *Circuit Judges*.

BROWN, *Circuit Judge*. When this case was first here, *Wilburn Boat Co.* v. *Firemen's Fund Ins. Co.*, 5 Cir., 201 F.2d 833, 1953 AMC 284, we held that federal maritime rules were applicable to the Hull policy on the Motor Yacht WANDERER. Her destruction by fire on February 25, 1949, is the subject of this protracted litigation. The Supreme Court reversed, 348 U.S. 310, 99 L.ed. 337, 1955 AMC 467, holding that the law of some state applied.

and remanded the cause to the District Court for the determination of which state that would be, and whether under the laws of that state the claimed actions [1] by the Assureds amounted to breaches or would otherwise constitute a defense under the policy.

Inevitably this involved the basic question whether this was a Texas or an Illinois [2] contract, for it seems quite clear, if not conceded, that under Illinois law one or more of the acts, note 1, would be an absolute defense. However, under Texas law the anti-encumbrance statute [3] would make the breach of the anti-mortgage clause (see, (a), note 1, *supra*) inconsequential, and other specific Texas statutes [4] and their judicial interpretation might

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[1] The Insurer asserted that the policy was forfeited because of a breach of the (a) anti-encumbrance warranty because of admitted chattel mortgages, (b) transfer of title or interest warranty because of a transfer by the individual owners (Assureds) to their wholly owned Oklahoma corporation, (c) private, not commercial, use warranty because the boat was intended to be used in commercial charter operations on Lake Texoma, also (d) misrepresentation of the value of the boat at the time the amount of insurance was increased, and (e) fraud and concealment of the facts concerning (a), (b), (c) and (d).

[2] How Illinois came into the picture so that this became a problem may be briefly stated. The Wilburns purchased the WANDERER then laid up in Greenville, Mississippi. McKinney, a Denison insurance agent acting for Wilburns stating that he had no facilities for marine insurance, requested the Cleaveland Agency of Rock Island, Illinois, to arrange for insurance covering her movement to Lake Texoma and subsequent operation. The Cleaveland Agency, as agent for Insurer, a California corporation with a Division office in Chicago, had previously issued to the former owners a port risk cover on the vessel. On behalf of the Insurer the Rock Island agent issued the several indorsements to effectuate this insurance and forwarded them to McKinney for delivery to Wilburns. The premiums were paid by two checks of the Assureds drawn on a Texas bank payable to the Rock Island Agents to whom they were transmitted by McKinney.

[3] Tex. Rev. Stat. (1925), Art. 4890, Acts 1913, p. 195, re-enacted without change, Texas Ins. Code, Art. 5.37 Lien on Insured Property.

[4] See, e.g., Art. 4930 Tex. Rev. Stat. (1925), Acts 1913, p. 194, Tex. Ins. Code 6.14; Art. 5043 Tev. Rev. Stat. (1925), Art. 4947 (1911), Acts 1903, p. 94, unchanged, Tex. Ins. Code 21.16.

These and other provisions, including the one cited note 3, supra, are conditions upon which foreign insurance corporations are permitted to do business in Texas. Art. 5068, Tex. Rev. Stat. (1925), Acts 1903, p. 94, Art. 4972 (1911), unchanged, Tex. Ins. Code 21.43; Art. 4880, Tex. Rev. Stat. (1925), Acts 1913, p. 195, without change, Tex. Ins. Code 5.27 (Sec. 3, General Laws of the State of Texas, 33rd Leg., Ch. 106).

permit a determination that the other asserted actions did not constitute defenses.

This basic question turned on whether, at the time this policy was issued to these Assureds, the Insurer was "doing business within" Texas. If it was, Art. 5054, whose validity can no longer be open to serious question, *Griffin* v. *McCoach*, 313 U.S. 498, 85 L.ed. 1481; *Watson* v. *Employers Liability Insurance Company*, 348 U.S. 66, 99 L.ed. 74, by its terms[5] and judicial application, *Metropolitan Life Insurance Co.* v. *Wann*, 130 Tex. 400, 109 S.W. 2d 470 (1937), made the policy a Texas contract. This was, of course, a question of fact for proof.

But on the remand to the District Court, no further formal trial (before a successor Judge) was had. The cause was submitted under an express stipulation of October 31, 1955, that the case should be tried solely on the evidence admitted and judicial admissions of fact theretofore made on the initial trial resulting in the judgment of December 13, 1951, subsequently reversed by the Supreme Court.

That stipulated record did not contain evidence on which the Court could base a finding of doing business in Texas. Two years later when the Judge filed his memorandum opinion he recognized this yet went on to say "* * * but the Plaintiffs, through their attorneys, have

[5] Art. 5054, Tex. Rev. Stat. (1925), Acts 1903, p. 94, Art. 4950 (1911), unchanged, Art. 21.42 Tex. Ins. Code:

"Texas laws govern policies: Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed and the premiums and policy (in case it becomes a demand) should be payable without this State or at the home office of the company or corporation issuing the same."

now exhibited to the Court a certificate[6] from the Board of Insurance Commissioners of the State of Texas certifying that the defendant [Insurer] was authorized to pursue the business of certain types of insurance, including fire and marine insurance, in the State of Texas from June 1, 1948, to May 31, 1949, and contend that this Court must take judicial notice of the fact that the Defendant was doing an insurance business in the State of Texas from June 1, 1948, to May 31, 1949. This contention of the Plaintiffs is correct • • •."

But the fact that this certificate was "exhibited to the Court" long after the stipulated record had been closed, with no record indication that the adverse party was given an opportunity either to object or to refute it in fact, did not constitute the admission of it into evidence.[7] Nor was it, as the District Court stated, a matter on which the Court, in this posture, could take judicial notice.

Since the District Court's whole opinion rested on the foundation that this was a Texas contract, it is clear that the resulting judgment cannot stand in view of the absence of legally-admitted evidence on the crucial point of doing business in Texas.

This does not mean, however, that we are compelled or ought to reverse and render the cause in the Insurer's favor. The certificate of the Insurance Commissioner, while not legally received in evidence, reflects in a con-

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[6] As reflected in the record before us, this was not merely an ex parte hearsay certificate by the Chairman of the Board of Insurance Commissioners as to what had been done. It was a certified copy of the actual permit issued pursuant, so it stated, to "Chapters 11 and 18, Title 78, R.C.S., Texas, 1925." If actually offered in evidence we may assume, without deciding, that it would have been admissible as an official record. 28 U.S.C.A. 1739

[7] Indeed, the record here shows that this instrument was not filed with the Clerk until August 13, 1957, nearly two months after the final judgment had been entered and a month after Notice of Appeal and Supersedeas Bond had been filed and approved.

vincing way that there is a substantial probability that the actual fact accords with the certificate, and that evidence is available to establish this point in the proper way. In view of that, and the general approach to do substantial justice, FRCP 61, 28 U.S.C.A. 2111, we think that, as in similar situations before, this is a case in which the interests of justice require that the case be reversed and remanded for a new trial. *M. M. Landy, Inc.* v. *Nicholas*, 5 Cir., 221 F.2d 923; *Associates Discount Corp.* v. *United States*, 5 Cir., 200 F.2d 537; *City of Fort Worth* v. *United States*, 5 Cir., 188 F.2d 217.

Since the cause is being remanded to permit proof on this point, it would be manifestly unfair to allow the case to be opened up to supply deficiencies in the Assureds' proof without according to the Insurer a full and unrestricted opportunity to offer other or further evidence on this and all other phases of the case. The trial tactics and strategy of the Insurer were undoubtedly tailored to the stipulated record which was, we have held, inadequate. The result is that to enable this protracted case to be put in shape where a final decision can be reached, the cause must again be tried. On that retrial the former records may continue to be used, but both parties should be given the fullest liberty to replead, to utilize all facilities of the Rules of Civil Procedure in preparation for trial and, on the trial, offer such further evidence and testimony as each may deem advisable on any and all issues.

For like reasons it would be manifestly inappropriate for us now to forecast what those issues will be or how or in what manner they should be decided. That will, and should, be the function of the Trial Court on the record made before it on the new trial.

The cause is therefore reversed and remanded for a new trial and such other and further consistent proceedings.

REVERSED AND REMANDED.

A true copy

Test: Edward W. Wadsworth
Clerk, U. S. Court of Appeals, Fifth Circuit
By /s/ Gilbert F. Ganucheav
Deputy

New Orleans, Louisiana
(Seal)

ORDER DENYING REHEARING

Extract from the Minutes of October 17, 1958.

FIREMAN'S FUND INSURANCE COMPANY

No. 16945 versus

WILBURN BOAT COMPANY, ET AL.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

* * *

JUDGMENT.

Extract from the Minutes of September 18, 1958

FIREMAN'S FUND INSURANCE COMPANY,

No. 16945. versus

WILBURN BOAT COMPANY, ET AL.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for a new trial and such other and further consistent proceedings;

It is further ordered and adjudged that the appellees, Wilburn Boat Company, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be isesued out of the said District Court.

* * *

FILE COPY

Office-Supreme Court, U.S.
FILED
FEB 11 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 646

FIREMAN'S FUND INSURANCE COMPANY,
Petitioner-Appellant Below,

VERSUS

WILBURN BOAT COMPANY, ET AL.,
Respondents-Appellees Below

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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FIREMAN'S FUND INSURANCE COMPANY,
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WILBURN BOAT COMPANY, ET AL.,
Respondents-Appellees Below

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The United States Supreme Court rendered a decision in this case on February 28, 1955. The decision is reported in 348 U.S. 310 under the name of *Wilburn Boat Company, et al. v. Fireman's Fund Insurance Company*, and is reprinted in the transcript of record, Court of Appeals Case Number 16,945, Pages 4 to 35 (RR 4-35). The U. S. District Court at Sherman, Texas filed a "Memorandum Decision" which is unreported but is set out in the printed transcript of record, Court of Appeals Case

Number 16,945 (RR. 56 to 60). The Fifth Circuit Court of Appeals decision in Case Number 16,945 is reported in 259 F. 2d 662 and is reprinted in the appendix to the Petition.

Statute Involved, 28 USC 2106

"The Supreme Court or any other court of appellate jurisdiction may * * * reverse any judgment * * * lawfully brought before it for review and may remand the cause * * * or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963."

Respondents' Statement of the Case

Petitioner's "Summary Statement" cannot be accepted.

On June 27, 1949, citiation was served on petitioner's Texas statutory agent, located in the Wilson Building, Dallas, Texas (R. 10, 11).[1] The petitioner has never contested the Texas service of process. It could not do so. An insurance company doing business in Texas is required by law to designate a statutory agent for service of process (Texas Insurance Code, Article 3.65, formerly Article 4763, Revised Civil Statutes of Texas).[2]

On July 15, 1949, Fireman's Fund Insurance Company filed a Petition to Remove this Civil Action to the

[1] "R" refers to printed transcript in first appeal to Fifth Circuit. Case No. 13,956. "RR" refers to printed transcript in second appeal to Fifth Circuit, Case No. 16,945. Numbers after R and RR refer to original printed page numbers in these transcripts.

[2] According to the records of Texas Board of Insurance, Fireman's Fund Insurance Company paid to the State of Texas over $176,000.00 in occupation and maintenance taxes on premiums collected on Texas business during 1948 and 1949.

District Court of the United States for the Eastern District of Texas, Sherman Division. The heading of the petition states that Fireman's Fund Insurance Company is "an insurance company doing business in Dallas County, Texas and is incorporated under the laws of the State of California" (R 2 and 3). The same is true of the Removal Bond and Removal Notice filed by the insurance company (R 5, 7). The Petitioner, in its Affidavit for Service of Notice to the Clerk of the 59th District Court of Grayson County, Texas, admitted that Fireman's Fund Insurance Company did business in Texas (R 14). Also see petitioner's Federal Court stipulation for an extension of time to file motions and answers (R 19). The respondents relied on the truth of these admissions. These admissions standing alone are sufficient to support the Trial Court's finding that the petitioner did business in Texas and was authorized to do business in Texas and that the appropriate state law was the law of Texas (RR 53 and 54).

On February 28, 1955, the Supreme Court reversed and remanded this case and ruled that general admiralty law would not apply and that the District Court should try same "under appropriate state law" (348 U.S. 310) (RR 17). A copy of the certificate permitting the insurance company to do business in Texas was submitted to this Court in Appendix A of petitioner's brief filed on August 23, 1954. Thereafter, the insurance company did not choose to deny the validity of the certificate or to amend its pleadings in order to raise the defensive issue that they were not doing business in Texas. By stipulation, the insurance company voluntarily elected not to contradict their admissions that they "were doing business in Dallas, Texas". On the record and the stipula-

tion, petitioner in effect agreed to accept the law of the forum, to-wit: Texas.

Astounding as it may appear, the insurance company voluntarily chose not to submit any testimony of their own witnesses to support its defenses. At the conclusion of the assured's prima facie case of contractual liability at the original trial in December 1949 (R 224), the insurance company elected to stand on their motion for judgment. This motion was granted by the first trial court. Petitioner voluntarily pitched their case on the legal proposition that admiralty law governed the rights of the parties to the exclusion of State insurance regulations. They lost their point. (348 U.S. 310).

The bold faced heavy type of Footnote 1 on Page 2 of the insurance company's petition, claims to describe what they now allege to be a "foul loss". The footnote states fact and legal issues which have already been decided against the insurance company (RR 36-60). The findings of fact of the Trial Court have not been declared "clearly erroneous" and therefore, petitioner's Footnote No. 1 cannot be substituted for the Trial Court's findings. (RR 36-60). See *McAllister v. U. S.*, 348 U.S. 19, 20, 1954 AMC 1999, and *Commerce Oil Corp. v. Dixie Carriers, Inc.*, 252 F. 2d 386, 1958 AMC 815, 818, 819 (CA-5, 1958). Petitioner's version of the facts are misleading and prejudicial and do not tell the full story of this acknowledged fire loss which the insurance company has kept in litigation for ten years.

The Appellate Court's decision of September 18, 1958, to remand this case placed the insurance company in the dilemma of being forced to prove defenses which they

know, or should know, cannot be proved.[3] Petitioner now seeks to extricate itself from its sad plight by pseudo legal conclusions based upon some nebulous legal right arising out of a stipulation they voluntarily executed.

On May 29, 1957, the Trial Court filed its "Memorandum Decision" and ruled that petitioner was doing business in Texas (RR 53 and 54). This legal conclusion has not been, and cannot be, denied or stipulated against (*United States v. John J. Felin & Co.*, 334 U.S. 624, 640.) The Trial Court's ruling was made after both parties submitted trial briefs to the District Court and after extensive oral argument and presentation of the facts of the former trial. On April 22, 1957, the Certificate of the Texas Board of Insurance Commissioners (RR 64) was submitted to the Trial Court, on plaintiff's oral motion, to rebut petitioner's oral argument that the insurance company was immune from the insurance laws of Texas. The Trial Court granted the motion and directed respondent to furnish an authenticated certificate for the record. After carefully considering all available evidence and petitioner's argument on the very point now presented to the Supreme Court, the District Court Judge, exercising his sound judgment, and mindful of the law pertaining to public documents, took judicial notice of the Texas certificate (RR 64) which is a part of the public records of Texas. After reviewing the pleadings and documents on file and the facts presented, the Court concluded that the insurance laws of Texas governed the rights of the parties (RR 53-54).

---

[3] During 1948 and 1949, Fireman's Fund Insurance Company collected over $5,000,000.00 premiums on insurance business written in Texas. (Taken from public records of Texas State Board of Insurance.)

On June 26, 1957, judgment was entered awarding Wilburn Boat Company damages in the liquidated sum of $40,000.00 with interest at the rate of 6 percent per annum from May 12, 1949 (RR. 60-61).

On September 18, 1958, the Court of Appeals for the Fifth Circuit reversed the decision of the lower court. In so doing, the Appellate Court placed in issue and considered a defense not pleaded by the insurance company. In spite of petitioner's admissions and the above judicial admission, the Appellate Court ruled that there was insufficient proof for the Appellate Court to resolve the issue of whether or not Fireman's Fund Insurance Company was doing business in Texas. The case was remanded to the District Court for additional proof and was reversed to give petitioner an opportunity to amend its pleadings and present additional evidence in support of its defenses and give respondent an opportunity to cross examine petitioner's witnesses and if necessary, present rebuttal testimony.

Reasons For Not Granting the Writ

The questions presented in the petition herein filed challenge the right of the United States Court of Appeals to remand a civil action to a District Court for additional proof, where counsel representing both parties to the lawsuit stipulate that the previous trial record of the same case and judicial admissions of fact can be used to determine the rights of the parties.

The Judicial Code, (28 USC 2106) quoted above, authorizes the Court of Appeals to remand the case at bar, if additional evidence is necessary to assist the appellate court to determine a vital point in a lawsuit. In the in-

terest of justice this must be done, irrespective of a stipulation voluntarily entered into by the parties to the lawsuit. The stipulation was not intended to be a drop cloth to hide true facts but was rather intended to expedite the handling of this case and to conserve the time and expenses of all parties concerned including the judiciary.

The decision of the Fifth Circuit is not in conflict with any of the decisions relied upon by the petitioner. The case of *Greenspahn v. Joseph E. Seagram & Sons, Inc.*, 186 F. 2d 616 (CA2, 1951), involves a "settlement stipulation" and not a stipulation relating to a previous trial record. Different rules and reasoning apply where the parties to a lawsuit stipulate to settle a claim and thereafter one of the parties welshes on the settlement agreement. *Berry v. Commissioner of Internal Revenue*, 254 F. 2d 471, 474, 475 (CA9, 1957), has no application to the stipulation now under consideration because it involves a federal tax case which is governed by special statutory rules concerning income tax stipulations. See 26 U.S.C. 1111, Tax Court Rule 31(b). This case actually supports the Fifth Circuit decision in the case at bar. The *Berry case* was remanded in spite of the stipulation. *Burstein v. U.S.*, 232 F. 2d 19 (CA8, 1956), is not in conflict with the case at bar. In that case, the district court made an error in applying stipulated facts to contract damages fact issues and the appellate court remanded the case.

In *United States v. John J. Felin & Co.*, 334 U.S. 624, 640 (1948), this Court ruled:

> "Even where the parties to the litigation have stipulated to the facts, this Court will disregard the stipulation, accepted and applied by the courts below, if the stipulation obviously forecloses real questions of law."

The Supreme Court of Texas in *McClure v. Heirs of Sheek*, 4 S.W. 552 (1887), has this to say concerning the effect of a stipulation entered into by respective counsel.

> "Agreements of counsel in regard to the trial of a cause are not absolute, although in writing; and are not to be treated as contracts to be enforced under all circumstances. They may be set aside by the Court, in the exercise of a sound discretion, when their enforcement would result in serious injury to one of the parties, and the other would be prejudiced by its being set aside."

To the same effect *Porter v. Holt*, 11 S.W. 494 (1889).

Petitioner cannot be prejudiced because they have admitted that they were doing business in Texas. They have not and cannot deny this fact or legal conclusion. See Footnotes 2 and 3. The argumentative conclusions and opinions of counsel, unsupported by affidavits or proof, cannot by themselves establish the fact that the insurance company will be seriously injured if this case is remanded to the trial court.

The insurance company argues that if this lawsuit is remanded and retried, the evidence will no longer be "fresh and available". The answer is that the public records of Texas are, and will be, just as "fresh and available" at a new trial as they were ten years ago. If petitioner's investigation of this claim has not produced an "arsonist" in ten years time, it is unlikely one will be discovered at this late date or before retrial. Up to this time arson has not been pleaded as a defense. The truth of the matter is, the petitioner does not have available facts to support its defenses, whether pleaded or not. By their own choice, petitioner elected for the past ten years to contest this insurance claim on law points. It

is too late for petitioner to complain about "stale evidence" which they elected not to produce or bring to light.

It is almost inconceivable that one of the largest insurance companies in the United States should attempt to conceal its true business status in the various states of the Union in order to defeat an acknowledged fire insurance claim of one of its assureds. State insurance regulations do not permit this. One questions whether a State can continue to recognize a foreign insurance company when said company seeks to defeat insurance claims of its citizens on the grounds that there is insufficient evidence in the record to establish the truth of a fact they admit and cannot deny, to-wit: that the insurance company was and is doing business in the State. This is especially true where the public records of State and the pleadings on file (R. 2, 3, 5, 7, 14, 19), clearly indicate that the insurance company was doing business in the State. How far can an insurance company push its privilege to do business in a State before there is a breach of trust with the citizens of that State?

In 1948 and 1949, Fireman's Fund Insurance Company did, and still does, business in every state of the Union. The total admitted assets of the company was $335,000,000.00. In 1949, the net premium earned was $107,000,000.00 and the losses incurred were $54,000,000.00. See *Moody's Bank & Finance Manual of 1957*, Pages 1436, 1437.

If an injustice has been done by the ruling of the Fifth Circuit Court, it fell upon the assureds. Respondents operated a small town grocery store and they lost all their liquid assets and their grocery business because petitioner refused to pay an acknowledged fire loss.

CONCLUSION

No substantial federal question has been raised by petitioner, there is no direct conflict of appellate court decisions, the insurance company has suffered no injustice, therefore, this petition for writ of certiorari should be denied.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
FEB 25 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 646

THE WANDERER

FIREMAN'S FUND INSURANCE COMPANY,
Petitioner-Appellant Below,

versus

WILBURN BOAT COMPANY, ET AL.,
Respondents-Appellees Below.

REPLY BRIEF.

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The Scheffer Press, Inc.—ANdover 3-6850

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REPLY BRIEF.

As mere reading of the Response will have suggested, it offers the too-easy opportunity of demonstrating that it travels on misstatements and irrelevance.

The main point, however, is that respondents offer that too-easy opportunity in the hope of inducing forgetfulness of the real issue of general importance that is submitted by the Petition — whether a party in a Federal Court dare rely on a deliberate stipulation of the factual basis upon which the case is to be decided.

Instead of facing the real issue presented, respondents go outside the stipulated record in a grossly improper attempt to influence this Court with various materials

(none of which are either evidence or judicial admission) for two irrelevant and diversionary purposes:

First, to discredit the following determinations of the Court of Appeals:

> "That stipulated record did not contain evidence on which the court could base a finding of doing business in Texas." (Petition, Appendix p. 3a)
>
> "Nor was it, as the District Court stated, a matter on which the District Court, in this posture, could take judicial notice.
>
> "Since the District Court's whole opinion rested on the foundation that this was a Texas contract, it is clear that the resulting judgment cannot stand in view of the absence of legally-admitted evidence on the crucial point of doing business in Texas." (Petition, Appendix p. 4a)

The petition does not attack those holdings on which the Court of Appeals explicitly based its decision below that the judgment should be reversed and remanded for a new trial. The respondents chose not to attack them; they filed no petition for *certiorari* to have this Court redetermine those matters. Those matters are not here. Having failed to bring those issues here, the whole response consists of nothing but an attempt by respondents to discredit — not support or supplement — those holdings, by oblique discussion and innuendo (almost wholly injected by supposed material outside the record.) But for those holdings, the particular judgment below could not have been entered. Respondents' oblique attempt to discredit those holdings is obviously an attempt to attack the judgment below. This they may not do; this Court holds they have no standing to do so. *LeTulle* v. *Scofield*, 308 U.S. 415, 421 (1940); *Kellogg* v. *National Biscuit Co.*, 305 U.S. 111 (1938); *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191 (1937); *Langnes* v. *Green*, 282 U.S. 531, 536-539 (1931).

Second, respondents' purpose is to induce forgetfulness of the fact that *if there had been* any basis in the record as made by plaintiffs-respondents for any finding that petitioner was doing business in Texas at the time of the contract (as the Court of Appeals held there was not) petitioner would not have rested on plaintiff's inadequate proof, but would have gone forward with its own proof, not only on that question, but — since there might then have been at least some basis for a finding that Texas law governed — with its evidence of defenses undebatably good under Texas law. The Court of Appeals expressly so recognized. (Petition, Appendix p. 5a)

The real issue which respondents never face — on which they hope to prevail, not by meeting it, but by inducing the Court *to forget it* — is whether a party in a Federal Court dares to rely on a deliberate, unchallenged and valid stipulation of the factual basis on which a case shall be decided; or must he expect that the stipulation will be disregarded, and that he will be put to proof at a remote time of matters theretofore irrelevant upon his opponent's proof, and, after the lapse of many years, when his evidence will have suffered the deterioration that, as the law recognizes in every context, necessarily infects all human evidence with the lapse of time.[1]

---

[1] The "response" makes this crass effort to dodge the real issue abundantly clear; e. g., that petitioner was doing business in Texas when the suit was removed (Response, 2, 3) affords no basis for a finding that it was doing business in Texas at the earlier time when this policy attached; the District Court recognized that and the Court of Appeals so held. (Vide supra) A party who has deliberately stipulated that the cause shall be tried on the judicial admissions and evidence admitted in the record, is asking this Court to subvert the judicial process and compound the District Court's offense—an offense condemned by the Court of Appeals in a holding respondents did not ask this Court to reconsider—by repeated and extensive reference to obviously inadmissible hearsay.

The response compounds this attempt at diversion by downright misrepresentation.[2]

Respondents' treatment of authority is in keeping with their treatment of the facts.

They present an isolated sentence from the opinion of Mr. Justice Frankfurter in *U. S.* v. *John Felin & Co.*, 334 U. S. 624, 640 (1948) as follows:

> "Even where the parties • • • have stipulated as to the 'facts', this Court will disregard the stipulation, accepted and applied by the courts below, if the stipulation obviously forecloses real questions of law."

Anyone who reads the context of that sentence will discover why Mr. Justice Frankfurter put the word

---

[2] One example, of many, is the innuendo that petitioner did not raise the issue that this contract was governed by Illinois law and not by Texas law. On page 3 of the response it is noted that respondents attached a copy of this certificate of authority to do business, to their brief in this Court before the re-trial; and proceeds to state that petitioner "did not choose to deny the validity of the certificate or to amend its pleadings in order to raise the defensive issue that they were not doing business in Texas." In petitioner's brief in this Court we specifically pointed out that the certificate was not in the record, called attention to the fact that, as there stated, on that record petitioner was "not shown ever to have done any business in Texas or even to have solicited any there." (Our Brief filed October 4, 1954, in this Court in No. 7, October Term, 1954, page 10 and Note 4.) That being thus pointed out to them, respondents nevertheless chose to stipulate that there should be no further evidence. It is interesting that respondents elected not to invite the petitioner's counter-proof even on this point, though they well knew that the statute they invoke depended on evidence which they knew was not in the record. They well knew petitioner's position that the cause was governed by Illinois law as against Texas law from the pleadings (R. 93), the argument at the first trial (285, 286), the argument before the Court of Appeals on the first appeal (Wilburn Boat Co. v. Fireman's Fund Insurance Co., 201 F. 2d 833, 837), and the argument in this Court.

"facts" in quotation marks. It was part of a discussion showing that this Court is not bound by so-called findings of "fact" which are really not such, but findings of mixed propositions of *law* and fact.

The Court of Claims had held that replacement cost was the proper measure of compensation. It had entered certain findings on that theory. (*Ibid,* 631-632) Mr. Justice Frankfurter's opinion noted that these findings were "inescapably enmeshed in considerations that are familiar issues of law and particularly of constitutional law," and referred to the well-recognized rule that where a conclusion is a "composite of fact and law," the Court might hold the findings erroneous as a matter of law. The parties in that case *had* proved certain *other* facts — requiring in Mr. Justice Frankfurter's view *the legal conclusion* that a certain measure of damages was controlling. They could not then change that *legal conclusion,* arising from those *other* facts *proved,* either by showing (or even by stipulating) matters irrelevant thereto. The point is that the attempt there was not to foreclose facts, but to foreclose a *legal conclusion.*

In this case all the facts *in the record* dictated the legal conclusion drawn by the Court of Appeals which respondents do not challenge and have no standing to challenge — that *on this record* Texas law cannot rule this case. Parties may stipulate the factual basis upon which the case shall be "*solely*" determined — as these parties did — and such a stipulation does bind the Court to enter no legal conclusions which the stipulated factual basis does not support.

This obvious and well-settled distinction, *viz.*, that parties may not bind the Court to conclusions of law by calling them "facts" in a stipulation — but that when they stipulate the factual basis of determination the

Court is bound thereby — is spelled out in *Burstein* v. *U. S.*, 232 F. 2d 19 (CA 8, 1956) — a case cited in the Petition at Page 6, on which respondents have no comment. The Court of Appeals for the Eighth Circuit made the distinction mentioned; and held, in accordance with all authority in Federal Courts that we have found or that has been cited:

> "Valid stipulations are controlling and conclusive, *and courts are bound to enforce such stipulations.*" (*Ibid.*, 22) [3]

It is significant that respondents have no comment whatever on this case, cited at pages 6 and 12 of the Petition.

Similarly, respondents isolate a few sentences from a *Texas* case (*McClure* v. *Heirs of Sheek*, 4 S.W. 552 (1887)) which say that a stipulation is not to be enforced like a contract "under all circumstances," but may be set aside by the Court "when their enforcement *would result in serious injury* to one of the parties **and** *the other would not be prejudiced by its being set aside.*" (Response, p. 8) Of course this supports our position, as shown also by the other Texas cases cited in the Petition at page 12. The use to which respondents then put the quotation they isolate is, however, revealing. They go on to say (Response, p. 8) that Petitioner would not be prejudiced by setting aside the stipulation because, they say, it has "admitted" that it was doing business in Texas and that Petitioner's evidence will not have deteriorated because "the public records of Texas are and will

[3] "[W]e deem the stipulation before us to be a stipulation of facts and not the stipulation of a legal conclusion to be drawn from the facts." **Ibid, 24.** The case further develops this plain distinction.

be just as 'fresh and available' as they were ten years ago." Such talk is nonsense. The Court of Appeals has held that there is no basis for a finding that Petitioner was doing business in Texas at the time this policy attached; and certainly Petitioner had not admitted it. Neither would Petitioner's evidence on that point—or its evidence to show that this was a foul loss—consist of public records.

Respondents seek to camouflage their failure at two trials to present any evidence whatever that could bring this case within reach of Texas law by asserting that Petitioner has not produced an arsonist. The *non-sequitur* is evident. The respondents, who well knew what the real fact was as to arson, were sufficiently concerned as to what evidence Petitioner could produce at the second trial to forego production of evidence necessary to bring the case under Texas law, if that would keep out the fruits of Petitioner's investigation. Respondents preferred the desperate alternative of sending the District Judge after the second trial a copy of a purported authority to do business in Texas in the hope of inducing the District Court to commit the error of concluding the question of actually *doing business* in Texas by "judicial notice,"—rather than face Petitioner's evidence as it was at that time. Their own act, at that time—in contrast to their present professions of confidence as to the *present* unavailability of an arsonist—tells its own story. As the Court of Appeals for the Eighth Circuit observed: "Stipulations are frequently the result of compromise." (*Burstein* v. *U. S.*, 232 F. 2d 19, 22 (CA 8, 1956)

Neither in the District Court, nor in the Court of Appeals, did respondents show or even claim any injustice

to themselves as a result of enforcing the stipulation, or absence of prejudice to Petitioner from setting the stipulation aside. And neither court was in possession of the facts on which to make such determinations. The District Court (not the Court of Appeals—and certainly not this Court) was the place to have attacked the stipulation. This, the respondents — with full knowledge of all relevant facts and considerations—chose not to do.

The attempt of respondents to shrug off two of the three cases (from the Second and Ninth Circuits) cited at page 6 of the Petition and their total failure even to comment on the *Burstein* case, *supra,* cited at the same page, demonstrates their inability to find any answer to the single and far-reaching issue presented by the Petition, or to the plain fact that the present decision is in conflict with decisions in other courts of appeal.

The court below having squarely held that petitioner was entitled to judgment on the stipulated record perpetrated an obvious injustice when it deprived petitioner of the benefits of respondents' deliberate stipulation. Respondents sought and secured that stipulation to obtain advantages to themselves in view of their knowledge of the then-existing situation in order to escape the impact of petitioner's proof as it existed at that time. Now in view of their knowledge of the evidentiary situation as it has become after the lapse of years, respondents are cheerfully willing to accept the unasked and unexpected favor of relief from their stipulation—contrary to the law as declared by the courts, including three other Federal Courts of Appeal.

There can be only one view that conflict between Federal Courts of Appeal as to what the law is raises an intolerable uncertainty.. That uncertainty here goes to a proposition vital to the daily administration of "equal justice under law." Will a Federal Court of Appeals which cannot possibly know the considerations that underlay its making, strike down *sua sponte* the deliberate, valid and unchallenged stipulation of the parties as to the factual basis upon which solely the case shall be tried?

Respectfully submitted,

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JOE A. KEITH
Attorneys for Petitioner

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Office-Supreme Court, U.S.
FILED
MAR 27 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 646

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 646

THE WANDERER

FIREMAN'S FUND INSURANCE COMPANY,
Petitioner-Appellant Below,

versus

WILBURN BOAT COMPANY, ET AL.,
Respondents-Appellees Below.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

In the petition for certiorari filed in this Court, the petitioner presented as grounds for granting a writ of certiorari the conflict between the decision of the Court of Appeals below and the decisions of the 2nd, 8th and 9th Circuits cited therein and the general importance in the administration of the federal judiciary of the proper effect and handling of stipulations that a case be tried solely upon evidence admitted and judicial admissions made at an earlier trial. This Court by its order denying certiorari had indicated that it does not consider these grounds as warranting review by this Court.

In keeping with Rule 58 of this Court, the petitioner limits this petition to other substantial grounds available to petitioner although not presented in the petition for certiorari.

The decision below is in conflict with the decisions of the highest Court of the State of Texas on a matter of state law.

As noted in the petition for certiorari, upon remand of the case to the District Court following the earlier decision of this Court, the parties stipulated as follows:

"STIPULATION.

"It is stipulated that this case shall be tried solely on the evidence admitted and judicial admissions of fact heretofore made in this cause in this Court, on which judgment was entered on December 13, 1951."

The Court of Appeals held:

(1) that this stipulated record did not contain evidence on which the Court could base a finding of doing business in Texas. (Petition, Appendix p. 3a);

(2) that the District Court could not on that record take judicial notice that the petitioner was doing business in Texas when the policy attached. (Petition, Appendix p. 4a);

(3) that, there being no evidence or admission in the stipulated record that petitioner was doing business in Texas when the policy attached, the Texas statute, relied upon by respondents, as the basis for applying Texas law to determine liability under the policy, was inapplicable and the judgment based on Texas law could, therefore, not stand. (Petition, Appendix p. 4a).

Petitioner does not attack these holdings. Respondents have not attacked and have no standing to attack these holdings. (See p. 2 of Petitioner's Reply Brief in support of Petition for Certiorari).

Nevertheless, the Court of Appeals did not do the only thing justified on the stipulated record—direct judgment in petitioner's favor. Instead, relying on its general authority to reverse for a new trial where the record does not include sufficient evidence, it reversed and remanded for a new trial. None of the authorities cited by the Court of Appeals as authority for its action, however, involved a stipulation that the case be tried solely on evidence already in the record.

True, the type of order which may be entered by a federal Court of Appeals is a matter of federal law, in the sense that its power to act is founded upon a federal statute. Similarly, matters of procedure governing the trial of a cause in federal district courts are governed by federal law. In its petition for certiorari, the petitioner took the position that the effect of, and the proper method for relieving a party from, a stipulation that a case be tried solely upon certain evidence in the record of a former trial were matters of federal procedural law, review of which was warranted by the existing conflict between the Court of Appeal on these questions. This Court, in denying certiorari, however, may well have been of the view that these matters relate to the question of what evidence shall be admitted in a trial in a federal court. Absent a specific federal statute or established federal equity practice favoring the admissibility of certain evidence, such matters are to be determined under the applicable state law. Rule 43 (a) R. of Civ. Proc., 28 U.S.C. 1652. This Court may have concluded that the action of the Court of Appeals, in reversing for

a new trial at which the parties are to be permitted to offer any evidence in support of their respective positions, despite the stipulation that the case be tried solely on the evidence and judicial admissions already in the record, raised only a question of state law, correctly applied by the Court of Appeals. This is not the case.

The Texas law is clear that:

(1) Stipulations that a case be tried solely on certain facts are binding on the parties and the Court. The trial court may not, without expressly vacating the stipulation for cause, assume that other facts exist, nor may an appellate court, in the face of such a stipulation, reverse for the purpose of hearing evidence other than that stipulated.

(2) Stipulations that a case shall be tried solely on certain facts may not be vacated and set aside except by the trial court, on timely motion by one of the parties, and after a showing sufficient to support a finding that the party seeking to be relieved of the stipulation would suffer substantial injustice by reason of its enforcement and that the other party would not be prejudiced by its being set aside, but could be placed in the same position as if the stipulation had never been executed.

Aetna Life Ins. Co. v. *Smith*, 293 S.W. 243 (Tex. Civ. App., 1927) was a suit under the Texas Workmen's Compensation Act. The plaintiff-appellee was injured in the course of his employment by reason of a piece of hot steel striking the back of his right hand. The Industrial Accident Board made an award to which the defendant objected. It filed suit. The parties stipulated the facts upon which the case should be tried and further agreed:

"That this agreement constitutes a complete statement of all the facts in this case, with the exception of the extent of the disability to claimant's right hand."

The plaintiff-appellee offered in evidence testimony of injuries outside the terms of this agreement upon which the jury's verdict and judgment were rendered. The Court on appeal noted:

"The agreed statement was offered in evidence, and the record does not disclose objection thereto on the part of appellee in any particular of mutual mistake or otherwise. Neither does the record show any alteration or change or rescission of the agreed facts in any wise."

The Court accordingly held:

"Consequently, as the record stands, in no wise could the inquiry have been extended beyond the terms of the agreement by either party . . .

"In view of this agreed statement of facts, upon which the rights and liabilities of the parties were to be determined, the judgment must be reversed, because of the assigned errors in admitting, over objection, evidence of injuries wholly outside the agreed facts, and in not confining, as requested, the issues to the jury to the extent of the specific injury stated."

The Supreme Court of Texas has expressed identical views. In *Bennett* v. *Romos*, 252 S.W. 2d 442, (Tex., 1952), the issue was the validity of a certain tax foreclosure deed to plaintiff's predecessor in title in a trespass to try title action. One defendant, Nebarez, had owned a one-half undivided interest in the real estate in 1944. Prior thereto, in 1934, he had been declared legally incompetent, and in 1944, while still adjudged incompetent, he joined in a deed of the real estate to defendant's predecessor in title. In 1950, after being declared legally

sane, he confirmed this deed. The plaintiff contended that the 1944 deed was totally void, not just voidable, on the ground that there was an active guardianship for Nebarez in 1944. The Court stated at p. 449:

> "But be this as it may, the stipulation of facts before us agrees '. . . that the following constitute the facts in this case, except the documents to be introduced in evidence', and neither the recited facts nor the documents anywhere mention the existence of a guardian, active or inactive. When respondents thus expressly undertake to set out all the facts of interest to them, and the terms of the stipulations disclose that they must have examined in detail the record of both adjudications, would it not approach the officious for us to suggest that they made what is a negligent oversight if it be true that the existence of a guardianship has substantial bearing on the case. There is no presumption of guardianship from the mere recited fact of adjudication of insanity, and lawyers rarely rely on mere presumptions to state matters of importance to them, when it would be quite as easy to state the facts themselves."

and at pages 449-50:

> *"Undoubtedly the record does not permit us to hold, even did the decisions so justify, that the 1944 deed was a nullity because an active guardianship then existed—and thus affirm the result below as to the Nevarez half interest. Nor can we say that even a fact issue was raised on the point. Nor do the circumstances warrant us in sending this arm of the case back for a new trial, with the idea that new facts may be developed, which the interested parties themselves have not even suggested, which apparently do not exist and which might well not make any difference if they should exist."**

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* Italics added.

The Court reversed and rendered judgment on the stipulated record in favor of the defendant appellees. The dissenting opinion of Mr. Justice Smith specifically suggested that the Court should remand for a new trial to hear additional evidence on this point in the teeth of the stipulation (as the Court of Appeals below did), but the Texas Supreme Court held that such action was not warranted in the face of such a stipulation.

Similarly, in *Hutcherson* v. *Sovereign Camp, W. O. W.*, 251 S.W. 491, (Tex., 1923), the Supreme Court was dealing with a suit on a life insurance policy defended by the insurer on the basis that the beneficiary had murdered the assured. The case was tried on an agreed statement of facts which recited that only the stipulated facts should be considered. The Court held the insurer had failed to prove on the basis of the stipulated facts that the killing of the assured was not accidental, stating at page 492:

> "When a case is so tried, the agreed statement is to be considered in the light of well-defined legal limitations, and in the nature of a special verdict: it admits there is no dispute as to the facts, and constitutes a request by each of the litigants for a judgment, which each contends arises as a matter of law from the agreed facts.
>
> "*The courts are without power, in the absence of a provision in the agreed statement providing otherwise, to draw any inference, or find any facts, not embraced in the agreement, unless, as a matter of law, such other inferences are necessarily compelled: and the judgment of the court must only declare the law which necessarily arises from the facts agreed upon* . . .*
>
> "As a general rule, conclusions of fact by the trial court have no office in the trial of a case upon an agreed statement of facts."

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* Italics added.

Accord, *Darr* v. *Johnson*, 257 S.W. 682, (Tex. Civ. App., 1923); *Ocean Accident & Guarantee Corporation* v. *Riggins*, 291 S.W. 276, 278, (Tex. Civ. App., 1927); *Texas Sporting Goods Co.* v. *Texas Gulf Sulphur Co.*, 81 S.W. 2d 805, 808, (Tex. Civ. App., 1935); *Cousins* v. *Cousins*, 42 S.W. 2d 1043, 1046, (Tex. Civ. App., 1931); *Newman Bros. Drilling Co.* v. *Stanolind Oil & Gas Co.*, 296 S.W. 2d 567, 570, (Tex. Civ. App., 1956).

Similarly, the Texas courts have clearly held that a party may be relieved of a stipulation only upon a showing of serious injury if the stipulation in enforced and proof that the other party will not be prejudiced by setting it aside. If the other party has acted in reliance upon the stipulation it may not be set aside unless he can be restored to his position prior to his entry into the stipulation. *Porter* v. *Holt*, 11 S.W. 494, (Tex., 1889); *Early* v. *Burns*, 142 S.W. 2d 260, (Tex. Civ. App., 1940). These cases unambiguously state the law of Texas applicable to the decision of the District Court and Court of Appeals below.

With these well established rules let us compare the action of the Court of Appeals below. That Court was confronted with a record (upon which the parties had stipulated that the case should be solely tried) which the Court itself held contained no evidence whatsoever that petitioner was doing business in Texas when the policy of fire insurance sued on was transferred to the Wilburns or their corporation. On this record no other holding was possible except that petitioner was not doing business in Texas at that time, in which event it is conceded (and the Court of Appeals so held) that Texas law is inapplicable to the construction of this policy. And, if Texas law is inapplicable, Illinois law (the state where the contract was entered into and was to be performed)

is conceded to be the applicable law. (Petition, Appendix p. 2a). Under Illinois law the breaches of warranty proved by petitioner are admittedly valid defenses. Accordingly, *on the record* petitioner was entitled to judgment in its favor. All this the Court of Appeals itself held. (Petition, Appendix pp. 2a, 3a). With the record entitling petitioner to judgment and a stipulation that the case should be decided solely upon that record, the Court of Appeals nevertheless remanded for a new trial for the purpose of permitting the respondent to offer other evidence not permitted to be offered under the terms of the stipulation. This action was taken:

(1) despite the fact that the respondents at no time in this litigation have asked either the District Court or the Court of Appeals to vacate or modify the stipulation;

(2) the respondents have made no showing before the District Court or the Court of Appeals of any basis whatsoever for modifying or setting aside the stipulation;

(3) the petitioner in neither court was given any opportunity to show the serious injury which will result to it by reason of setting aside the stipulation;

(4) the Court of Appeals did not even specifically address itself to the interrelationship between the stipulation and its action in reversing for a new trial at which the parties will not be bound by the stipulation.

This action is in direct conflict with the law of Texas as set forth in the Texas decisions cited herein. Further, this Court may possibly have felt that there was some

doubt as to the scope of the stipulation—whether or not it was intended to be applicable to all further proceedings in the case. This stipulation is far different from a stipulation that a particular fact is true for the purposes of a particular trial. At a second trial such a stipulation may no longer be binding. Here, however, the parties stipulated that the case should be tried *solely* on the record made at the first trial. On that record petitioner was admittedly entitled to judgment. There is, therefore, no basis for granting a new trial. It is hardly reasonable to grant a new trial in the face of the stipulation solely because the stipulation was not intended to apply upon such a new trial. In any event the Texas Courts have held that stipulations as to evidence apply not only to the trial wherein made, but to all subsequent trials *unless the agreement expressly states that it is applicable to only a particular trial. Lee* v. *Wharton*, 11 Texas 61 (1853) *Villareal* v. *Passmore*, 145 S.W. 1086, (Tex. Civ. App., 1913).

To allow respondents at this late date, nearly four years after the stipulation was executed, to put in new evidence in conflict with the stipulation, will not achieve justice in this case. Respondents, prior to entering into the stipulation, knew that to recover under the Texas law they had to prove petitioner was doing business in Texas when the policy attached. They demonstrated their full understanding of the significance of such proof by attaching a copy of a purported certificate of authority of petitioner to do business in Texas to their brief in this Court on the earlier appeal, *before the stipulation was entered into.* They then knew the legal issue, they then had whatever evidence on the point they now possess, and they knew the significance of such evidence, yet they then proceeded to solemnly stipulate that the case be tried without such evidence. To now strike down the stipulation

leaves the respondents in possession of a substantial measure of the advantage they sought by the stipulation, but frees them of its burdens. Such action deprives petitioner of the protection of the stipulation after it is no longer possible to restore it to its position prior to its entering into the stipulation. Such action, because manifestly unjust, has been declared improper by the courts of Texas as well as other federal Courts of Appeal.

CONCLUSION.

This Court should grant this petition for rehearing and a writ of certiorari to review the action of the Court of Appeals in deciding a matter of the state law of Texas in a manner clearly contrary to the law of that state as declared by its highest court.

Respectfully submitted,

EDWARD B. HAYES
JOE A. KELLY
Attorneys for the
Petitioner-Appellant

CERTIFICATE.

The undersigned hereby certifies that the above Petition for Rehearing is presented in good faith and not for delay and that the Petition for Rehearing is confined to other substantial grounds justifying this Court in granting a writ of certiorari to review the decision below, available to petitioner, although not previously presented to this Court.

EDWARD B. HAYES